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No. 77-1772

In the Supreme Court of the United States

OCTOBER TERM, 1978

CHAIM KAHAN, SOLOMON WERCBERGER, AND MOR WERCBERGER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 572 F. 2d 923. The opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1978. A petition for rehearing with a suggestion of rehearing *en banc* was denied on May 15, 1978. The petition for a writ of certiorari was filed on June 14, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence seized in a search of petitioners' warehouse pursuant to a search warrant should have been suppressed on the ground that the affidavit upon which the warrant was issued contained a misstatement of fact.

2. Whether the facts stated in the affidavit furnished probable cause for the search.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were each convicted of receiving more than 5,072 cartons of Schick shaving products which had been stolen while being transported in interstate commerce, in violation of 18 U.S.C. 659.[1] Petitioners were each sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. A).

1. The facts are set forth in the opinion of the court of appeals (Pet. App. 2a-10a). Briefly, at approximately 9:00 p.m. on March 11, 1975, a Time D.C. tractor-trailer carrying 6,910 cartons of Schick products was hijacked near the junction of Routes 80 and 287 in Jew Jersey. The next day, portions of the stolen goods were delivered to the S&F Warehouse and the CBS Warehouse, in Brooklyn, the latter of which was operated by petitioners.[2] The following day, additional portions of the

[1]Petitioners were acquitted of conspiracy to receive and possess the same goods. Prior to trial, co-defendant Stanley Diamond pleaded guilty to the conspiracy charge. Co-defendants Vincent Santa and Manuel Gomez were tried separately, together with Joseph DeLuca, James DeFillippo and Patrick DeFillippo, on a superseding indictment. All five were convicted of possession of the stolen property and conspiracy.

[2]Kahan, Mor Wercberger, and Solomon Wercberger were, respectively, the president, treasurer, and secretary of CBS Warehouse Inc.

hijacked load were delivered to the CBS Warehouse, which was by that time under F.B.I. surveillance. All three petitioners participated in the unloading of the stolen property. After the unloading had been completed, F.B.I. agents, acting pursuant to a search warrant, entered the warehouse and seized the hijacked goods.

2. The affidavit in support of the search warrant (Pet. App. E) stated that 6,910 cartons of Schick razors bearing the product specification number 02-40 had been hijacked on March 11, 1975, and that on March 12, 1975, a reliable informant had observed several thousand Schick cartons bearing the number 02-04 at the CBS Warehouse. Petitioners moved to suppress the evidence seized in the search on the ground that the affidavit failed to establish probable cause. This motion was denied (Pet. App. B).

In preparing for trial, the government discovered that the affidavit was inaccurate. The informant, who had participated in delivering the stolen goods to S&F Warehouse on March 12, 1975, had not been in the CBS Warehouse on that day, but rather had been told by others involved in disposing of the property that a load was being delivered to the CBS Warehouse. The government informed the trial judge of the inaccuracy (C.A. App. 172a-174a)[3], and a hearing was held. F.B.I. Agent Robert Pecoraro testified at the hearing that the informant had called him late in the evening of March 12, 1975, and had told him that he had participated in the unloading of the hijacked goods. When Agent Pecoraro asked the informant where the goods were then located, the informant said (C.A. App. 252a), "It's on the location in Brooklyn. We took two loads out today, we took one

[3]"C.A. App." refers to the appendix filed by petitioners in the court of appeals.

to CBS Warehouse and took two to Brooklyn Navy Yard to S&F." On cross-examination (C.A. App. 262a-263a), defense counsel asked whether the informant had said that "he had taken the load to CBS Warehouse," and Pecoraro replied, "Sir, that is the way I understood the conversation to go." Following the hearing, the court held that the inaccuracy in the affidavit did not warrant suppression of evidence (C.A. App. 268a-269a).

ARGUMENT

1. Petitioners contend (Pet. 7-10) that the district court should have suppressed evidence seized in the search of the CBS Warehouse on the basis of the inaccurate representation in the affidavit that the government's informant had personally observed several thousand cartons of Schick products in the warehouse.

In *Franks* v. *Delaware*, No. 77-5176, decided June 26, 1978, this Court held that inaccuracies in search warrant affidavits of probable cause require suppression of evidence only if they are material to the existence of probable cause *and* if they are made intentionally or in reckless disregard of their truthfulness.[4] Under this standard, the district court's refusal to suppress evidence was proper.[5] The informant's lack of precision in the description of his activities is not grounds for suppression of evidence. See *Franks* v. *Delaware*, *supra*, slip op. 8-9; *Rugendorf* v. *United States*, 376 U.S. 528, 532. Petitioners

[4]In view of the decision in *Franks*, there is no longer any need for this Court to resolve the differences which previously existed among the courts of appeals as to what types of false statements in affidavits of probable cause require suppression of evidence (*see* Pet. 7-8).

[5]In *Franks*, the Court also considered the question of when a defendant is entitled to an evidentiary hearing on allegations that an affidavit of probable cause contains false information. Since there was a hearing in the district court, this question is not involved here.

allege no more than simple negligence on the part of the F.B.I. agent, whose conclusion that the informant had been present in the CBS Warehouse was drawn from the informant's statement that "we took [a load] to CBS Warehouse" (pp. 3-4, *supra*). Even if the agent was negligent in failing to make further inquiry of the informant, his failure to ascertain the facts accurately was surely neither intentional nor reckless.

In view of the absence of evidence of intentional or reckless misrepresentation, there is no occasion for this Court to consider in this case the question whether, in determining the materiality of the false statement, the district court should have simply deleted the false statement instead of substituting for it the fact that the informant had been told by others handling the stolen property that a load was being taken to the CBS Warehouse (*see* C.A. App. 269a).

2. Petitioners contend (Pet. 11-14) that the affidavit fails to establish probable cause to believe that the Schick cartons in the CBS Warehouse were part of the hijacked load. This argument is in large part based upon the fact that the number 02-40, which appeared on the cartons, identified the product and not the hijacked shipment.

Petitioners' argument was properly rejected by both the district court (Pet. App. B) and the court of appeals (Pet. App. 10a-13a), and further review is not warranted. Although the fact that the number 02-04 appeared on the cartons was not conclusive that they had been stolen, it did substantially increase the likelihood that they were part of the hijacked cargo in light of the proximity of time and place.[6] As the district court reasoned (Pet. App. 27a):

[6]The court of appeals properly distinguished *United States* v. *Roth*, 391 F. 2d 507 (C.A. 7), cited by petitioners (Pet. App. 13a n. 5). In

Affidavits supporting search warrants are to be tested and interpreted in a common sense and realistic manner. *United States* v. *Ventresca*, 380 U.S. 102, 85 S.Ct. 741 (1965). The facts * * * [recited] must do more than arouse a suspicion that contraband is on the premises, but [they] need not rise to the level of proof necessary to convict. *Brinegar* v. *United States*, 338 U.S. 160, 69 S.Ct. 1302 (1949). The issue is whether the goods seen by the informant were likely to be the goods stolen the previous day.

Defendant argues that these products are so common that they "could be observed in hundreds of thousands of places throughout the United States on the same day." (Affidavit by Steven Thal, p. 5). While possible, it is unlikely that many places would have thousands of cartons of Schick razors on hand. The affidavit established that the quantity of razors observed at the warehouse on the day following the hijacking was extraordinary.

See *Vitali* v. *United States*, 383 F. 2d 121, 122 (C.A.1).

Roth, the court held that an affidavit in support of a warrant authorizing seizure of a stolen shipment of Hamilton Beach Blenders did not establish probable cause for the search.

The search warrant affidavit in the case stated in pertinent part: "That your affiant has been informed by Thomas Noonan, a Special Agent of the Federal Bureau of Investigation, that Agent Noonan personally observed a large number of boxes bearing the name 'Hamilton Beach' in the premises above-described, and that such boxes were observed through a window by Agent Noonan while he was standing in a public parking lot adjacent to said building." Thus, unlike the affidavit in this case, the *Roth* affidavit specified "[n]either the date on which Noonan observed the defendant's premises nor the *type of* * * * products * * * observed" (391 F. 2d at 511; emphasis added).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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